STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **CONSUMERS ENERGY COMPANY** for authority to increase its rates for the distribution of natural gas and for other relief.	)))))	Case No. U-18124

At the January 20, 2017 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

On August 1, 2016, Consumers Energy Company (Consumers) filed an application seeking authority to increase its retail rates for the distribution of natural gas by $90.5 million, based on a 12-month projected test year ending December 31, 2017.

Administrative Law Judge Suzanne D. Sonneborn (ALJ) held a prehearing conference on September 14, 2016. At the prehearing conference, the ALJ granted petitions to intervene filed by the Association of Businesses Advocating Tariff Equity and the Michigan Department of the Attorney General (Attorney General). A petition to intervene filed by the Midland Cogeneration Venture Limited Partnership (MCV) was opposed by Consumers. After consideration, the ALJ granted permissive intervention to the MCV in a ruling issued on October 3, 2016. The Commission Staff (Staff) also participated in the proceedings.

On December 14, 2016, Consumers filed testimony and exhibits, including proposed tariffs, in support of a self-implemented rate increase of $60 million for service rendered on and after January 29, 2017, to be allocated through an equal percentage increase as specified in MCL 460.6a(1). On December 19, 2016, the Staff filed testimony and exhibits opposing the self-implemented rates proposed by the company.

On December 21, 2016, the ALJ conducted a hearing on the proposed self-implementation at which two witnesses presented testimony (on behalf of Consumers and the Staff) and exhibits. On December 28, 2016, and January 4, 2017, Consumers and the Staff filed briefs and reply briefs.

Positions of the Parties

Michael A. Torrey, Vice-President, Rates and Regulation for Consumers, testified that, in deciding to file a general rate case, Consumers considers a number of factors including maintenance and regulatory compliance costs, costs to attract and retain a competent workforce, the need to maintain access to capital markets, the need to provide investors with an adequate return, and the need to provide customers with safe, reliable, and adequate service. 3 Tr 81-82. Mr. Torrey testified that the primary driver of the request for rate relief in this case was the need for additional investment in infrastructure, claiming that 83% of the proposed $90.5 million rate increase was associated with enhanced infrastructure replacement, new business, compression and transmission system replacement, pipeline integrity, asset relocation, and technology programs. 3 Tr 83-84.

Mr. Torrey noted that while the company is requesting $90.5 million in final rate relief, it is only requesting 66% of that amount in the interim, and in its self-implemented rates, Consumers assumes its current return on equity (ROE) of 10.3%, although the company is requesting a higher ROE as part of its final relief. 3 Tr 87. Finally, Mr. Torrey testified that the company is proposing

an equal percent rate increase of 6.68% to all customer classes, consistent with the approach specified in MCL 460.6a(1). 3 Tr 88; Exhibit SI-2.

Robert F. Nichols II, C.P.A., Manager of the Revenue Requirements Section of the Commission's Financial Analysis and Audit Division, testified that the Staff does not support Consumers' proposal to self-implement $60 million, because, based on the Staff's review of the case, the company has a revenue sufficiency. Mr. Nichols testified that according to Exhibit S-1, Consumers has excess revenues of $2.796 million on a jurisdictional basis. 3 Tr 107.

In its initial brief, Consumers provides an overview of the self-implementation provisions of 2008 PA 286 (Act 286), noting that self-implementation replaced the more contentious and litigated "partial and immediate" rate relief process that was formerly in place. Consumers contends that the enactment of the self-implementation provisions of Act 286 was critical to allowing utilities to continue necessary investments without concerns about regulatory delays. Consumers reiterated that although the $60 million self-implemented amount is less that the company's $90.5 million request for final rate relief, it is nevertheless sufficient to meet the company's commitments to its customers and its investors.

Consumers contends that any disagreement about the size of the company's revenue deficiency is not good cause to prevent self-implementation of new rates. According to Consumers, the Staff and intervenors filed testimony and exhibits in the direct case on December 19 and 22, 2016, and the company is reviewing that testimony intending to file rebuttal. Consumers argues that the intent of Act 286 was to operate in the absence of a fully-developed evidentiary record and that the only evidence on self-implementation was presented by the company. According to Consumers, the Staff's testimony and exhibits are based on the Staff's case-in-chief, which is not part of the record at this point in the proceeding.

Consumers further points out that if the company's self-implemented amount exceeds the final rate relief granted, Act 286 provides for refunds with interest, in some cases including interest calculated at the company's authorized ROE, which the company describes as a significant deterrent to self-implementation of an excessive amount. Consumers concludes that there is no record evidence or legal argument that provides good cause to deny the company a self-implemented rate increase of $60 million.

The Staff argues that there is good cause to deny Consumers' self-implementation of a $60 million rate increase because the proposed increase could result in rates that are unjust and unreasonable. The Staff contends that although Act 286 provides for self-implemented rates 180 days after a rate case is filed, the Staff's review of Consumers' filing demonstrates that a significant amount of the company's proposed rate increase is contingency expense and that the Staff's final revenue calculation shows that Consumers will have excess revenue during the test year. The Staff argues that, despite the self-implementation provisions under MCL 460.6a(1), the Commission nevertheless has an overarching duty to ensure that rates are just and reasonable. The Staff further posits that the opportunity for refunds will be an insufficient remedy for overpayment for some customers, as the Commission has found in the past.

The Staff concludes that in order to avoid potentially unjust and unreasonable rates, the Commission should issue an order denying self-implementation entirely, or at least limiting the self-implemented rates to $40 million or less, noting that $40 million was the amount of rate relief Consumers was granted in its last gas rate case.

In reply, Consumers reiterates that the intent of the self-implementation procedures under Act 286 was to address investor concerns about regulatory lag and to replace the extensive litigation previously required to demonstrate the need for partial and immediate rate relief.

Consumers argues that the Staff's references to other statutes, or other parts of Section 6a(1), are inapposite, because the self-implementation portion of the statute was enacted more recently and is specific rather than general.

Consumers contends that finding good cause to deny self-implementation on the basis that another party recommends a lower revenue deficiency would essentially provide a veto over self-implementation, rendering that provision illusory. Consumers adds that the underlying basis for the Staff's recommendation is its determination of a revenue excess, the details of which are not contained in the record at this point. Consumers asserts that the Staff's case "contains significant and material flaws, which will be addressed in rebuttal evidence." Consumers' SI reply brief, p. 13. In summary, Consumers claims that the Staff failed to demonstrate good cause to delay or deny self-implementation of new rates beginning January 27, 2017.

Discussion

Section 6a(1) of 2008 PA 286 (Act 286) sets out certain requirements and procedures for gas and electric utility rate cases:

> If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates. . . . For good cause, the commission may issue a temporary order preventing or delaying a utility from implementing its proposed rates or charges.

Section 6a(1) further provides that if the self-implemented rate exceeds the rate authorized in the final order, the excess shall be refunded to customers with interest. MCL 460.6a(1).

Prior to the enactment of Act 286, existing rates were conclusively deemed to be just and reasonable, and any unapproved rate increase implemented *ex parte* was conclusively unreasonable and unlawful. *Northern Michigan Water Co v Public Service Comm*, 381 Mich 340, 352-353; 161 NW2d 584 (1968). Act 286 radically revised the regulatory paradigm by authorizing utilities

to simply file and use a new tariff 180 days after the filing of a rate case. However, the Legislature built an important safeguard into this authority. The new tariff may be used only absent "good cause" for the Commission to issue an order preventing or delaying implementation of the proposed rate. MCL 460.6a(1). The Commission discussed "good cause" in its February 8, 2011 order in Case No. U-16418, p. 6:

> Act 286 provides no definition of "good cause." Thus, the Commission may consult a dictionary and case law to ascertain its meaning. [*In re*] *Utrera*, 281 Mich App [1] at 10; *Consumers Power Co v Dep't of Treasury*, 235 Mich App 380, 385; 597 NW2d 274 (1999). Black's Law Dictionary (8th ed.) defines good cause as "[a] legally sufficient reason." In defining good cause as used in the Michigan Court Rules, the Michigan Court of Appeals has found it to mean "a legally sufficient reason," and "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." *Utrera*, at 10-11; *Richards v McNamee*, 240 Mich App 444, 451-452; 613 NW2d 366 (2000). In applying principles of statutory interpretation, the primary goal of a court is to discern and give effect to the drafter's intent. *Richards*, 240 Mich App at 451. "When reviewing the circumstances of a given case to determine whether good cause exists, this Court seeks to effectuate the Legislature's intent." *Franchise Management Unlimited, Inc. v America's Favorite Chicken*, 221 Mich App 239, 247; 561 NW2d 123 (1997).
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> The legislative history of Act 286, as represented by both the House Fiscal Agency Legislative Analyses and the Senate Fiscal Agency Bill Analyses, sheds no light on the meaning of "good cause," but does note that "The bill would retain a requirement that the utility place in evidence facts relied upon to support its petition or application to increase rates and charges." Senate Fiscal Agency Bill Analysis, HB 5524 (H-3), June 4, 2008, p. 3 of 17. Thus, the Commission, in determining whether good cause exists to prevent or delay self-implementation of new rates, will look to whether the utility has supported its application for a rate increase and its self-implementation filing, and will examine whether a legally sufficient or substantial reason for prevention or delay exists.

The Staff points out that both it and the Attorney General have found that for the test period in this case, the company will experience a revenue excess. Further, the Staff contends that a significant amount of the company's revenue request is based on contingency amounts that may never be spent. The Staff further argues that the refund mechanism provided under Act 286 is imperfect at best, and not an adequate remedy in the case where self-implemented rates are

reduced in the final order. The Staff contends that Consumers will have to refund $10 million from its previous rate case, noting that there are significant similarities to the circumstances presented here. The Staff also argues that the Commission should consider that the self-implemented increase is occurring at a time when gas deliveries are at their highest for many customers.

In response, Consumers insists that the Staff's recommendation is based on evidence that is not contained in the record, and that the only record evidence concerning self-implementation was provided by the company. Consumers adds that the refund portion of the statute has worked well and that neither the fact that the company had to provide refunds in its previous gas rate case, nor the timing of the self-implementation in this case, has any bearing on whether there is good cause to deny or delay self-implemented rates.

After taking into account the record and the arguments of the parties, the Commission finds there is good cause to prevent Consumers from self-implementing any portion of its proposed $60 million rate increase that exceeds $20 million. The Commission finds that, under the circumstances presented here, good cause exists to limit Consumers' self-implemented amount to $20 million.

In the past six years, Consumers has filed seven applications[1] requesting almost $500 million in rate relief for its natural gas business, and in the five of these cases that have been completed, the Commission has approved a total of $198.3 million, or about half of the amount contained in the company's original requests. In addition, it appears that in the cases where the company did

[1] Case No. U-15986 (final order issued May 17, 2010); Case No. U-16418 (final order issued May 26, 2011); Case No. U-16855 (final order issued June 7, 2012); Case No. U-17197 (order approving withdrawal issued on December 6, 2013); Case No. U-17643 (final order issued January 13, 2015); Case No. U-17882 (final order issued April 21, 2016); and this case filed on August 1, 2016.

self-implement a rate increase, the increase was consistently more than the final rate relief. While these increases, occurring virtually every year, are not the sole reason to prevent or delay self-implementation, the Commission must nevertheless consider this tendency to overstate the amount of interim and final rate relief the company believes it requires, along with the issues raised by the Staff in opposing self-implementation here.

The Commission adds that it rejects Consumers' claim that the only competent and material evidence in the record on self-implementation was that provided by the company. Although Consumers criticizes the Staff's presentation as based on the Staff's final rate relief calculation (the entire scope of which, indeed, is not in the record at this point) the company's proposed self-implemented rates are likewise based on its final rate request, which is also not yet in the record. While the Commission recognizes that, for various reasons, it will not adopt all of the positions presented by any one party to this proceeding, the Commission is basing its determination, as noted above, on the company's tendency to overstate the amount it requires for both interim and final rate relief.

A rate increase of $20 million represents a reasonable amount of Consumers' full rate request, and it addresses concerns about regulatory lag while recognizing that self-implementation of the rate increase proposed by the company is excessive. Finally, the Commission's determination in this case is based on the specific circumstances presented here and does not represent a change to the Commission's policy with respect to self-implementation.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company's proposal to implement the tariffs filed on December 14, 2016, is denied for good cause as set forth in the order.

B. Consumers Energy Company shall file tariff sheets that are consistent with the findings in this order by January 27, 2017. Absent further order of the Commission, these tariffs may be implemented on January 29, 2017, on a service rendered basis.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 426.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

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Sally A. Talberg, Chairman

By its action of January 20, 2017.

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Norman J. Saari, Commissioner

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Kavita Kale, Executive Secretary

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Rachael A. Eubanks, Commissioner